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Counterstatement of the Questions Presented

1. Whether this court should take up for review a diversity action, admittedly involving an application of local common law* (unfair competition based upon an alleged appropriation of proprietary material), which involved principally the determination of numerous questions of fact relating to highly technical and scientific proofs.

2. Whether there exists any basis for review by certiorari, where, irrespective of the applicable law as to what constitutes proprietary material, the District Court found as a fact that the alleged proprietary material was not, in any event, appropriated by Respondents.**

3. Whether there exists any basis for review by certiorari (a) where the Petition on its face discloses that the purported special reasons for review are not genuine and (b) where the record, reveals that there was no genuine issue or controversy below as to the applicable law.

4. Whether there exists any basis for review by certiorari where the Petition is based upon the contention that the law of the forum, California, was ignored but where even a cursory review of the opinion below reveals in fact that the law of the forum was extensively considered and applied.***

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* Petition, Page 8, n. 2.

** Finding No. 37, R. 164:

"The trial of this case consumed 17 days. The transcript in the case covers over 2500 pages. Portions of depositions were introduced which were not transcribed into the record. The plaintiff introduced 214 exhibits, the defendants 274. Many of the exhibits consist of pamphlets and documents of many pages. All have been restudied since the trial in arriving at the conclusion that Tarzian had no trade secret."

Finding No. 67, R. 173:

"The testimony and exhibits establish that Audio's process is dissimilar to and differs materially from the Tarzian process and this conclusion is reinforced by an examination of the patents and publications in which the various steps claimed as secrets, and as set forth in plaintiff's statement, Exhibit JN, are taught."

*** 166 F. Supp. 250, 256-266 (S.D. Calif. 1958).

Counterstatement of the Case*

Silicon p-n diodes, the subject matter of this litigation, were developed prior to 1952, and they were an outgrowth of the work done by Bell Telephone Laboratories in 1948 on what is commonly known as a transistor, a miniature device similar to a rectifier, utilizing semiconductive material such as silicon and germanium. In 1952, Bell Telephone Laboratories announced the development of a silicon p-n junction diode prepared by an alloying technique stating that the use of the device would fall under the general heading of rectifiers (Finding 38, R. 164, Ex. Q).

Immediately following, there was a tremendous expansion in the trade publications and reports with respect to the manufacture, design and composition of germanium and silicon devices (R. 1086-1087, Finding 39, R. 164). At the time this controversy arose silicon rectifiers were manufactured by many companies in the United States in a great variety of structures and characteristics for almost every known electrical application and were well known devices in the art (Exs. E, J, BW, Finding 41, R. 165).

In 1955, petitioner purchased for $160,000 the plant of Silicon Corporation of America ("Silcoa"), a small company engaged in making silicon rectifiers, and removed some of its personnel, its equipment and inventory to Bloomington, Indiana, where plaintiff established a silicon rectifier operation (Finding 10, R. 155).

Silcoa was not a financial or manufacturing success. The contract of purchase made no reference to trade secrets but simply contained a provision that Silcoa would not compete for a limited period of one year, to January, 1957 (Finding 11, R. 156). The agreement not

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* Pursuant to Rule 40(3), Supreme Court Rules.

to compete was valued at only $5,000 by petitioner as of June 30, 1956 and was depreciated to zero as of June 30, 1957. No value was ever attributed to any alleged secrets acquired from Silcoa or to silicon rectifiers (Finding 12, R. 156), although plaintiff's statements attributed value to trade secrets in other electronic devices.

Technical personnel employed by Silcoa and fully familiar with its process were not restricted in the use of information (except one, for a limited period of 2 months following January, 1956) and several of these individuals entered the employ of other companies and manufactured silicon rectifiers in accordance with Silcoa processes. Others described the essential details of petitioner's claimed secret process in Government publications which were distributed to the industry (Finding 13, R. 156-157).

Contrary to the implication in the Petition of extended research, Tarzian was offering to the trade, within six to eight weeks, a low priced silicon rectifier, which utilized the same basic junction (core of the device) as had been made at Silcoa, a device which had been previously made at Sylvania, and which was also made by Clevite and Radio Receptor on the basis of the Sylvania and Silcoa work (Ex. HZ, 1217-1219, 1656-1657). Further, engineers familiar with the same work were spread out in employment, without restriction, with such companies as R. C. A., I. B. M., Transistor Products, and Motorola (R. 1403-1406).

Also, contrary to the implication of uniqueness sought to be created in the Petition, there were a large number of manufacturers of silicon rectifiers of this type, several of which, Westinghouse, International Rectifier, Automatic Co., General Electric and Motorola, made low cost rectifiers for radio and television use (Finding 32, R. 162; Exs. E, J, BW, AG, AI, AH, AE, AN; R. 632-634; 636-649; 1552).

Unlike the inference sought to be created in the Petition to the effect that respondents immediately started up in business on the basis of the alleged proprietary work of

petitioner, the record facts reveal that respondents invested substantial sums in excess of about $1,000,000.00 in equipment, materials and research (Findings 23, R. 159 and 28, R. 161); that respondents struck out on their own to develop a different device and encountered numerous development and design problems (R. 1324-1327); that even at trial time respondents, as a result of following the path of independent development, had on hand 50,000 scrap rectifiers (R. 1324) and had not yet realized a profit; and that the final commercial product differed "substantially" in construction from that of petitioner (Findings 33, 34, R. 162 and 67, R. 173).

Finally, the District Court, after citing and considering some twenty-two California cases and other authorities immediately recognized as cases of precedent in this field, held that petitioner "had no trade secret" (Opinion, 166 F. Supp. 250, 270; Finding 37, R. 164); that its "complete process is so shown in at least five publications readily available to the trade" (Finding 45, R. 167); and that, in any event, respondents' process differed "materially" from petitioner's (Finding 67, R. 173).

ARGUMENT

I

This Court should not review a controversy which involved the application of local law to numerous questions of fact relating to highly technical and scientific proofs, and where, irrespective of the applicable law as to what constitutes proprietary material the Court found as a fact that nothing was appropriated.

Admittedly, the subject matter of this controversy involves the application of local law. An examination of the cases in this field indicates that general precedents from other federal and state courts are drawn upon, primarily

to indicate comparable fact situations but it is necessarily the local law of the forum which underlies the rationale of the decision.

Within the context of this local law, the District Court determined that (1) petitioner did not have a trade secret in the process or methods for the manufacture of a silicon rectifier;* and (2) that in any event, the process and methods practiced by respondents were, as a matter of fact, materially different than the process and methods claimed as trade secrets by petitioner.**

These separate determinations by the District Court were based upon an evaluation of a record consisting of more than 2,500 pages of transcript and 488 exhibits and principally comprising highly technical and scientific proofs, including expert testimony, charts, models and the like. The massive effort necessitated by the record is reflected in the elaborate Opinion and detailed documented Findings of the District Court (166 F. Supp. 250, 280).

One of the principal issues necessarily involved in the controversy was whether respondents appropriated any material alleged to be proprietary by petitioner.

The Petition attempts to create a question of law by contending that California law was not applied on this issue because the Court's conclusion was based on differences arising out of mere modifications or improvements. However, this is plainly not the fact nor the posture in which the case below was decided.

The fact, as previously noted, is that the Court found the differences to be "substantial"*** and "material".****

It is apparent that there is overwhelming evidence, beyond the requirements of Rule 52(a), F. R. C. P., to support these conclusions of the Court. The character of

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* Findings 36, 38-47; R. 163-7.
** Findings 49, 67; R. 168, 173.
*** Finding No. 34, R. 162.
**** Finding No. 67, R. 173.

the opinion of the Court of Appeals for the Ninth Circuit confirms the existence of such support for these Findings.

Some of the facts, as found on the record, supporting these conclusions are set forth in detail in Findings Nos. 34 (R. 162) and 50 to 66 (R. 168-173) where the substantial nature of the differences is made plain. After finding, on the basis of testimony by both parties, that processes for the manufacture of the device in issue necessarily followed the same fundamental steps,* the Court noted the following differences, among others:

(a) Petitioner and respondents purchased opposite types of silicon from different sources (Findings 50, 52, R. 168).

(b) Petitioner manufactured its own crystals whereas respondents purchased completed crystals on the open market. (Finding 50, R. 168)

(c) Petitioner and respondents utilized widely different methods of preparing silicon. As to respondents' method, petitioner's Chief Physicist testified that it was "essentially" opposite to that of petitioner's method and that he did not know of anybody who would want to do it in the manner of respondents' method (R. 822; Finding 52, R. 168)

(d) Petitioner's method in cutting and orienting silicon crystals was substantially different than respondents' in a critical and highly scientific aspect of the process for manufacture of a rectifier. (R. 1565-1567; Finding 54, R. 169)

(e) The soldering jigs and etching procedures were, as found by the Court, "entirely" different. (Findings 59-60, R. 171)

(f) Respondents did not use a transfer tray although petitioner did and claimed it as an important feature of its process. (Finding 61, R. 171)

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* Finding No. 42, R. 165.

(g) An alkaline solution was used by petitioner in chemical treatment whereas respondents used an acid which was chemically the opposite of petitioner's alkali. (Finding 63, R. 172)

(h) The methods of encapsulating the devices were so substantially different that petitioner withdrew any claim based thereon in the Court of Appeals. (Finding 65, R. 173)

(i) The production time was different by a matter of as much as 20 hours. (Finding 66, R. 173)

Petitioner is reluctant to recognize that the numerous and substantial differences in the respective processes detailed by the District Court are not merely minor modifications of *petitioner's claimed proprietary process*. They have however been found to be significant and material differences in the details of the *fundamental steps of a process which a manufacturer of alloyed rectifiers necessarily employed*, and over which petitioner *admittedly* had no proprietary claim. (Findings 42, R. 165 and 48, 167)

Therefore, even if the lower courts "ignored" California law, or misapplied it, in judging the character of petitioner's claimed secrets, the findings establish that respondents did not employ the process used by petitioner, ***no matter what its character.***

In the *By-Buk* case,* heavily relied upon by petitioner in the Court of Appeals and in the Petition herein, the trial court found that the machines were unique; that they had been painstakingly developed by plaintiff after he had been *unable to find any machines or plans for machines* to assist him; that he kept the discoveries secret; and that the defendant's machines were "substantially copies" thereof. In the instant case, the findings are ones of "substantial" and "material differences".

If there is any meaning in the admonition of Rule 52(a), F. R. C. P., that "Findings of fact shall not be set aside

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*163 Cal. App. 2d 157, 329 P. 2d 147 (1958).

unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses", then the Petition herein is far from adequate on the mere basis of the District Court's findings on the second issue of the controversy.

II

A. The Petition discloses on its face that the purported special and important reasons for review on writ of certiorari are not genuine

and

B. The record reveals that there was no genuine issue or controversy in the District Court as to the applicable law.

A.

Both questions presented by petitioner involve the simple issue of whether the lower courts "ignored California law of trade secrets" in disposing of the controversy (Petition, pp. 2-3). Presumably, if there were a substantial likelihood of this having occurred in the lower courts, the Petition might well provide one of the reasons this Court has traditionally considered in exercise of its sound judicial discretion toward review.

However, Petitioner appears less interested in the jurisdictional basis for this Petition, *i.e.*, the possibility that the lower courts may have ignored California law, than it is in creating a basis for obtaining an expression of views from this Court to add a general authority to what is purely a question of local cognizance. This is made quite clear in the following language from pages 7-8 of the Petition:

> "Although this is a diversity case, each decision in this growing body of law assumes national significance because of the tendency of this area to refer to general authority for delineation of the scope of protectible

trade secrets. This Court has not ruled on a question involving trade secrets since *Dupont De Nemours Powder Co.* v. *Masland*, 1917, 244 U. S. 100.[*] A definitive holding on the law of trade secrets under California law by this Court would not only remedy the failure of the courts below to apply the law but also establish guideposts for the future in an area where the recurring problem is one of protecting the valuable assets denominated trade secrets.[2]"

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[2] Petitioner recognizes that, in diversity cases, pursuant to the *Erie* v. *Tompkins* doctrine, there is no transcendental body of federal common law apart from the laws of the particular state involved. However, Petitioner believes that the significance of the individual precedents in this area of the law lends added emphasis to the need for this court to review the California law of trade secrets which, for all intents, parallels the general law."

If it is true, that "each decision * * * assumes national significance because of the tendency in this area to refer to general authority", then petitioner should not feel aggrieved if the lower courts yielded to this "tendency"? On the other hand, petitioner should not seek to perpetuate the same tendency in this Court if the basis for its grievance truly reposes in the lower courts' disregard for local law.

In truth, what petitioner seeks and needs from this Court is not a more particular regard for local law nor a more favorable application of general authority; it seeks and needs a special supervening precedent to enable it to overcome the imposing obstacle of 69 Findings of Fact (R. 150-175). This is most apparent from the Petition.

Since the law of unfair competition is purely of local cognizance and since, as the Petition discloses, petitioner

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[*] Prior to Erie v. Tompkins.

is not particularly seeking application of the local law which the lower courts supposedly ignored, there are no special and important reasons why this Court should be moved to permit review.

B.

Petitioner's present dissatisfaction with the scholarly holding of the District Court should be viewed in light of the fact that there was no conflict between the parties or with the District Court over the essential meaning of a trade secret at any time in the course of the trial. The common authorities, and especially the Restatement, were relied upon by all. As late as the closing arguments, counsel for petitioner was in complete accord with the expression read by the District Court from *A. O. Smith* v. *Petroleum Iron Works*, 73 F. (2d) 538 (C. A. 6, 1934).* Presumably, the *A. O. Smith* case remains "one of the very best" statements of the law because petitioner has seen fit to place great reliance upon it and to repeat a liberal portion of the same statement at page 21 of the Petition. The District Court also repeated it in the Opinion and obviously drew considerably from its principle in judging petitioner's claim.

Petitioner's rejection of the law applied by the Court below finds its origin in the necessity to find some basis for appeal and review in the light of the decisive Findings of Fact made herein. This is reflected in the following

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* At R. 1781: "Incidentally, I have studied many cases, so as long as I have interrupted you, I would like to say that I think one of the best definitions in a decided case is one from the Sixth Circuit, *A. O. Smith Corporation* against *Petroleum Company of Ohio*, decided in 1934. It was written by Judge Simonds, who is still a member of the court and now is the head of the court, chief judge of the court, and I want to read a statement because it confirms some of the discussions we have had."

At R. 1784, after reading from the *Smith* case: "* * * I thought I would call it to your attention as embodying a very good statement of the law.

"Mr. Dutton: I agree with you, your Honor. I think it is one of the very best."

transcript of the trial record, not part of the record transmitted to this Court.

In closing argument, petitioner's counsel stated (Trial Transcript 2389):

> "Each case we agree your Honor, must stand on its *own particular facts in this area.*" (Emphasis added.)

The posture of the case in the District Court seems to be made plain by the opening statement of counsel for respondents in the closing argument (Tr. 2442) where he stated:

> "I don't believe I have very much difficulty with the law that was cited and read by Mr. Dutton. But I confess I have some difficulty with the facts."

Counsel for the petitioner on rebuttal argument stated:

> "We think the substance of plaintiff's process is still in use by the defendants."

The Court replied:

> "I think that is the only safe ground to take, Mr. Dutton, because that is fundamental and not peripheral. * * * Either you have a secret as to an important thing or you don't. And the question is, did they take it."

Counsel for plaintiff then replied:

> "Precisely."

III

The lower courts did not "ignore" California law of trade secrets.

The District Court Decision

In Part II of the Opinion of the District Court (R. 78-149) captioned "Trade Secrets and Unfair Competition," the Court said the following:

> "What is a trade secret is difficult to define. However, on the whole, it must consist of a particular

> form of construction of a device, a formula, method or process that is of a character which does not occur to persons in the trade with knowledge of the state of the art or which cannot be evolved by those skilled in the art from the theoretical description of the process, or compilation or compendia of information or knowledge" (R. 87).

This definition by the learned District Court represents, respondents believe, as fine a capsule formulation of the qualities of a trade secret as may be found among all the authorities. It reflects, as the Opinion indicates, a thorough appraisal of a mass of precedent from the early Supreme Court cases such as *Fowle* v. *Park* (1889), 131 U. S. 88, 97; *Board of Trade* v. *Christie Grain & Stock Co.* (1905), 198 U. S. 236, 250, and *Dr. Miles Medical Co.* v. *Park & Sons Co.* (1911), 220 U. S. 373, 402, right through to the contemporary authorities found in the law of *California* as well as in the general law.*

Moreover, the foregoing definition expressed by the District Court is immediately derived from what is apparently the most widely approved authority in the field of trade secrets, the Restatement of Torts. Closely preceding the District Court's above definition is the following from the Opinion (R. 85):

> "In the comment on this section [Restatement, Torts, 757] two definitions are contained which are

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* The Opinion cited approximately 22 California cases and 2 law review articles on California law (R. 130-140). The Petition refers to 5 California cases, only 1 of which, the post-decided *By-Buk* decision, *supra*, was not cited by the District Court.

The inconsistency of petitioner's position that the courts below "deliberately ignored" California law, is reflected in its criticism of the District Court's actual application of two California cases, *LeVine* v. *E. A. Johnson & Co.*, 1951, 107 Cal. App. 2nd 322, 237 P. 2nd 309 and *Aetna Building Maintenance Co.* v. *West*, 1952, 39 Cal. 2nd 198, 246 P. 2nd 11. (See Petition, p. 13.) The same criticism was vigorously advanced in the Court of Appeals.

pertinent to the discussion to follow. The first is the definition of a trade secret:

"'A trade secret may consist of any formula, patterns, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials a pattern for a machine or list of customers.'

"As to secrecy, the same comment states:

"'The subject of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to others pledged to secrecy. Others may also know of it independently, as for example when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information.'"

In applying this definition to the petitioner's process, the District Court considered a whole range of specific characteristics implicit in the definition and also relied upon numerous authorities in varying factual situations encompassing those specific portions of the instant case which were similar. The principles are summarized by reference to Part IV of the Opinion, designated "Epitome of Accepted Principles" (R. 98-99):

"5. Trade secrets must be 'the particular secrets of the employer as distinguished from the general secrets

of the trade in which he is engaged.' For this reason, secrets acquired and developed as a result of long employment in the particuar trade may be carried over and put to use by the new employer and for oneself;

"6. Trade practices, to come within the obligation of secrecy must be secret. While they need not amount to invention, in the patent law sense, they must, at least, amount to discovery. It follows that matters which are generally known in the trade or readily discernible by those in the trade cannot be made secret by being so labelled in an agreement."

The authorities cited by the District Court in support of these principles are set forth in footnotes 48-54 (R. 138-140) to the Opinion and are immediately recognized as cases of precedent in this field. The proof upon which the findings are based disclosed that petitioner's trade secrets were found wanting in the light of these precedents.

Shortly after the decision of the District Court in September, 1958, the California District Court of Appeals filed its opinion in *By-Buk Co.* v. *Printed Cellophane Tape Co.* (1958), 163 Cal. App. 2d 157, 329 P. 2d 147. The Petition characterizes this decision as "the most recent and illuminating discussion" of the applicable California law and asserts that "it represents a definitive restatement of the accepted law of trade secrets of the State of California which the Courts below chose to ignore" (Petition, p. 18).

Since the *By-Buk* decision was not in existence at the time the District Court filed its Opinion in the instant case the District Court could not have chosen to ignore it. However, after the District Court Opinion was filed, Findings and Conclusions were submitted and were signed by the District Court on October 23, 1958—more than one month after the *By-Buk* decision—without the slightest utterance from petitioner by way of criticism, suggested revision or

deletion, supplementation or otherwise. If the then existent most recent "definitive restatement" of California trade secrets law were so critically at variance with the decision of the District Court, petitioner had ample opportunity to call it to the attention of the District Court prior to the filing of the Findings and Conclusions. However, the Petitioner *chose to ignore it*. The reasons are apparent.

In the *By-Buk* case the owner of the trade secrets had been unable to ascertain in the art any machinery or plans to accomplish the purposes he sought and by a system of trial and error developed a machine.* In the instant case, employees of the company which petitioner purchased had spread out to various manufacturers of similar devices and were utilizing the same information in manufacturing silicon rectifiers, while other such employees supplied information for government publications which were distributed to the industry describing the essential details of what petitioner claims to be its essential process.** Further, one of such publications was, in fact, specifically reviewed by respondents at the commencement of their operations.***

Both *By-Buk* and the District Court directly rely upon the Restatement definition of a trade secret.

Both draw from such definition the essential quality of uniqueness or novelty as a basis for a trade secret.

Both stand for the simple proposition that the thing sought to be protected as a trade secret must not be readily ascertainable by others.

By-Buk sustained a trade secret in the machines because their application as evolved by plaintiff was not readily

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* 329 P. 2d at p. 154.

** Finding 13, R. 156; Finding 45, R. 167.

*** R. 565, 593.

ascertainable by defendant. On the other hand, the Tarzian process was readily ascertainable to a multitude of knowledgeable people in the field (Findings 35, R. 163, 42-45, R. 165-167, 53, R. 169, 57, R. 170, 62, R. 172 and 67, R. 173).

It is apparent that the *By-Buk* case applied the same principles as did the District Court herein *but* to a different set of facts.

The Court of Appeals Decision

If it may be said that petitioner was tardy in discovering the *By-Buk* decision or in recognizing its purported significance, it may not be equally said that petitioner was unprepared to advance it in the Court of Appeals. In fact, the *By-Buk* decision may be characterized as petitioner's principal argument for reversal.

Petitioner's brief in the Court of Appeals cited the *By-Buk* decision in no less than 11 separate instances and discussed it in detail comparable to that set forth in pages 18-21 of the Petition.

To say, as does the Petition at page 7, that the Court of Appeals, in adopting the Opinion of the District Court "deliberately ignored California law," is a fatuous gesture in view of the intensity with which the *By-Buk* decision was urged on the Court of Appeals.

In truth, the only conclusion that may be drawn from the Court of Appeal's disposition is that the *By-Buk* case, as noted above herein, in fact coincided with the principles applied by the District Court herein. The *By-Buk* decision rests principally upon the same authorities that formed the District Court's views and advances the identical proposition that was expressed by the District Court, i.e., that a trade secret must essentially be unique or novel in the sense that it is not *readily* ascertainable by others. It was the

facts to which those principles were applied that were different.

In a footnote on page 21 of the Petition, there is a reference to *Lee* v. *Samburn*, Cal. Sup. Court 1952, 94 U. S. P. Q. 153, in a way that implies that this was another local precedent deliberately ignored by the lower courts. The District Court did not cite this case but it was called to the attention of the Court of Appeals. Actually, it substantially parallels the *By-Buk* case, although even that California Court did not see fit to cite it therein. Its complete consistency with the District Court's views is emphasized by its dedication to the principles expressed in *A. O. Smith* v. *Petroleum Iron Works*, 6 Cir. 1934, 73 F. 2d 531, portions of which opinion the District Court below quoted in its opinion and read into the record during the closing arguments (R. 1781-4).

It is plain that the charge by petitioner that the District Court "ignored" California law amounts to no more than disagreement with the District Court's interpretation of the authorities existing at the time the Opinion was written.

It is equally plain that disagreement with the Court of Appeal's reading of the authorities cited by the District Court *and* the *By-Buk* case underlies petitioner's charge against the Court of Appeals.

Two courts have already given great consideration to every phase of this controversy. Petitioner has had every opportunity to advance every argument and authority it possessed. Nothing was ignored. Respondents submit that there are no special and important reasons why this Court should make a third study of the holding.

CONCLUSION

In view of the foregoing, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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